

LETTER OPINION
95-L-83

March 27, 1995

William E. Woods, Jr.
City Attorney
P.O. Box 159
Parshall, ND 58770

Dear Mr. Woods:

Thank you for your letter requesting my opinion regarding whether a city may place restrictions in the advertisement and sale of city-owned real property that would mandate that the purchaser would be subject to pay real estate taxes and that the real estate would need to remain on the tax roles of the city.

Local governmental entities have only those powers expressly granted to them by the Legislature, or those necessarily implied from the power expressly granted. See, e.g., Parker Hotel Co. v. City of Grand Forks, 177 N.W.2d 764, 768 (N.D. 1970), Murphy v. Swanson, 198 N.W. 116, 119 (N.D. 1924).

In defining municipal powers, the rule of strict construction applies. Once a municipality's powers have been determined, however, "the rule of strict construction no longer applies, and the manner and means of exercising those powers where not prescribed by the Legislature are left to the discretion of the municipal authorities." Leaving the manner and means of exercising municipal powers to the discretion of municipal authorities implies a range of reasonableness within which a municipality's exercise of discretion will not be interfered with or upset by the judiciary.

Haugland v. City of Bismarck, 429 N.W.2d 449, 453-54 (N.D. 1988) (citations omitted) (quoting Lang v. City of Cavalier, 228 N.W. 819 (N.D. 1930)).

With regard to the power of municipalities to transfer property, N.D.C.C. ? 40-05-01(56) provides that the governing body of a municipality shall have the power to "convey, sell, dispose of, or lease personal and real property of the municipality as provided by this title." Title 40 has three statutes addressing the manner in which a city may dispose of property:

40-11-04. Ordinance required for the transfer of property. Every municipality shall enact an ordinance providing for the conveyance, sale, lease, or disposal of personal and real property of the municipality. When the property to be disposed of is estimated by the governing body of the municipality to be of a value of less than two thousand five hundred dollars, the property may be sold at private sale upon the proper resolution of the governing body. In all other cases, the property may be sold only at public sale or as provided under section 40-11-04.2

40-11-04.1. Real property transfer requirements. Upon resolution by the governing body of a city authorizing the public sale of real property, a notice containing a description of the property to be sold and designating the place where and the day and hour when the sale will be held shall be published in the city's official newspaper as provided in section 40-01-09 once each week for two consecutive weeks with the last publication being at least ten days in advance of the date set for the sale. The notice shall specify whether the bids are to be received at auction or as sealed bids as determined by the governing body of the city. The property advertised shall be sold to the highest bidder if his bid is deemed sufficient by a majority of the members of the governing body.

40-11-04.2. Transfer of real property by nonexclusive listing agreements. As an alternative to the procedure established under section 40-11-04.1, the governing body of a city may by resolution describe the real property of the city which is to be sold; provide a maximum rate of fee, compensation, or commission; and provide that the city reserves the right to reject any and all offers determined to be insufficient. After adoption of the resolution, the governing body of a city may engage licensed real estate brokers to attempt to sell the described property by way of nonexclusive listing agreements.

(Emphasis added.) The underlined language in N.D.C.C. ? 40-11-04 requires a city to enact an ordinance "providing for the conveyance, sale, lease, or disposal of . . . real property." It is my opinion that the underlined language authorizes a city to adopt an ordinance that is more detailed than state law. See Haugland, 429 N.W.2d at 453-54 (once a city's powers have been determined, the manner and means of exercising those powers, where not prescribed by the

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Legislature, are left to the discretion of the city authorities). See also Dahl v. City of Grafton, 286 N.W.2d 774, 778 (N.D. 1979) (the power to grant an option to purchase real property can be implied from the power given a city to convey, sell, dispose of, or lease real property). However, the ordinance must be consistent with the requirements of N.D.C.C. ?? 40-11-04, 40-11-04.1, and 40-11-04.2. (This opinion does not attempt to address the authority of a home rule city over the sale of its real property.)

Any restrictions the city imposes on purchasers of city property must be reasonable. See Haugland, 429 N.W.2d at 454. See also Fur-Lex Realty, Inc. v. Lindsay, 367 N.Y. Supp. 2d 388, 394-95 (1975) (putting restrictions on the purchase of property results in restricting the class of interested bidders, and this authority should not be abused). Certainly, a city's restrictions on purchasers of city property may not violate a potential bidder's constitutional rights or federal law.

N.D.C.C. ? 57-02-03 provides that "[a]ll property in this state is subject to taxation unless expressly exempted by law." N.D.C.C. ? 57-02-08 specifically exempts certain property from taxation, including property owned by the United States, the state of North Dakota, political subdivisions, schools, and certain real property owned by religious organizations, lodges, chapters, commanderies, consistories, farmers' clubs, commercial clubs, and like organizations. Rather than limiting potential purchasers to entities that are not tax exempt, perhaps the city may want to allow a tax-exempt purchaser to pay in-lieu-of taxes pursuant to a contract with the city.

It is not clear from your letter whether the requirement that the property remain on the tax roles of the city was intended to apply to just the immediate purchaser or future purchasers as well. For such a restriction to apply to future purchasers, the covenant would have to run with the land. See N.D.C.C. ? 47-04-24. Under North Dakota law, the only covenants which run with the land are those specified in Chapter 47-04 and those which are incidental thereto. N.D.C.C. ? 47-04-25. N.D.C.C. ? 47-04-26(4) states that such covenants may include payment of taxes. It is not clear to what extent this statute would authorize a city to require subsequent purchasers to pay taxes or make payments in lieu of taxes. The North Dakota Supreme Court has not had occasion to address the meaning of N.D.C.C. ? 47-04-26(4). Having no guidance on how the North Dakota Supreme Court would rule on this matter, I will refrain from issuing an opinion on whether a city may require subsequent purchasers to pay taxes or make payments in lieu of taxes.

In conclusion, it is my opinion that a city by ordinance may

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place restrictions on the sale of its real property, which would mandate that the purchaser be subject to pay real estate taxes or contract to make payments in lieu of taxes, as long as those restrictions are reasonable.

Sincerely,

Heidi Heitkamp
Attorney General

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